Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To end discrimination by electric utilities in providing access to the interstate transmission grid, the Federal Energy Regulatory Commission (FERC) required each utility that owns or operates interstate transmission facilities to file an Open Access Transmission Tariff (OATT) providing, inter alia, that any curtailment of "firm" transmission service to wholesale customers will be proportional to curtailment of transmission to the utility's own retail customers. Respondent Northern States Power Companies (collectively, NSP) initially filed such an OATT but later filed proposed revisions giving preference to their own retail customers. FERC rejected the revisions and reiterated its requirement that the OATT include nondiscriminatory curtailment provisions. The Eighth Circuit reviewed and remanded this FERC action as beyond FERC's jurisdiction. The questions presented are:

> Whether FERC has jurisdiction under the Federal Power Act to regulate all transmission of electricity in interstate commerce, including interstate transmission for sales to retail customers.
>
> Whether FERC has jurisdiction to prevent undue discrimination in the transmission of electricity in interstate commerce by requiring that any curtailment of firm transmission service to wholesale customers be proportional to the curtailment of firm transmission for sales to the transmitting company's own retail customers.
>
> Whether the Eighth Circuit erred in holding that FERC lacks jurisdiction to regulate curtailments of firm transmission of electricity in interstate commerce because the FERC regulation might "encroach upon

the authority of the regulatory commissions of the states."

Whether, if the case now becomes moot because of the withdrawal of NSP's filing, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot.

PARTIES TO THE PROCEEDING

The parties before the court of appeals were:

Enron Power Marketing, Inc.
Commonwealth Edison Co.
Dairyland Power Cooperative
Federal Energy Regulatory Commission
Minnesota Department of Public Service
Missouri River Energy Services
Northern States Power Company (Minnesota)
Northern States Power Company (Wisconsin)
Southern Minnesota Municipal Power Agency
Wisconsin Electric Power Company
Wisconsin Public Power, Inc.

RULE 29.6 STATEMENT

Euron Corp. is the only publicly held company owning 10% or more of petitioner's stock. The following companies are the parent companies of petitioner:

Enron Corp.
Enron North America Corp.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Enron Power Marketing, Inc. (Enron) respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 176 F.3d 1090 and reprinted at Petitioner's Appendix (Pet. App.) 1a to 11a. The Orders of the Federal Energy Regulatory Commission are reported at 83 F.E.R.C. ¶ 61,098 (April 30, 1998), 83 F.E.R.C. ¶ 61,338 (June 29, 1998), and 84 F.E.R.C. ¶ 61,128 (July 31, 1998) and reprinted at Pet. App. 12a to 43a.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999 and amended on July 20, 1999. A timely petition for rehearing was denied on September 1, 1999. This petition is timely filed pursuant to 28 U.S.C. § 2101(c) and Sup. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The Supremacy Clause, Art. VI, cl. 2 of the Constitution, provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

Sections 201, 205, 206, 211, 212, 213, and 313 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824l and 8251, are reprinted in the Appendix at Pet. App. 283a to 307a.

Sections 1, 4, and 5 of the Natural Gas Act, 15 U.S.C. §§ 717, 717c, and 717d, are reprinted in the Appendix at Pet. App. 308a to 313a.

Pertinent portions of FERC Order Nos. 888 and 888-A, [1991-96 Reg. Preambles], F.E.R.C. Stats. & Regs. ¶ 31,036 at 31,643 (1996) and [Regs. Preambles], III F.E.R.C. Stats. & Regs. ¶ 31,048 (1997) (order on rehearing), are reprinted in the Appendix at Pet. App. 51a to 280a.

STATEMENT

The Eighth Circuit's decision denies FERC a large part of its jurisdiction over the transmission of electricity in interstate commerce. The decision conflicts, in three important ways, with decisions of this Court and the D.C.

Circuit. It also strips FERC of the authority to open the transmission grid fully to competition, thus perpetuating discrimination by electric utilities that own transmission facilities.

In its Order Nos. 888 and 888-A, FERC found that transmission-owning utilities have an incentive to discriminate—and have discriminated—against competing sellers of electricity who need transmission. Pet. App. 94a-97a, 126a-130a, 255a-256a. FERC therefore required each transmission-owning utility to adopt a pro forma Open Access Transmission Tariff (OATT) providing, inter alia, that when system constraints require curtailment of transmission, the utility will not discriminate in favor of its own retail customers and against generating and marketing companies that have purchased "firm" transmission service from the utility. Order No. 888 at 31,748-49; Pet. App. 168a-169a.

Respondent Northern States Power Companies (collectively, NSP) adopted the OATT, *see* Pet. App. 314a-318a, but later proposed to amend the curtailment provision to state that NSP would give preference, in any curtailment, to its own retail customers. *See, e.g.*, Pet. App. 319a-320a. FERC rejected the amendment and NSP sought Eighth Circuit review. In the decision from which review is sought, the Eighth Circuit directed FERC to allow the NSP amendment "so as to not encroach upon the authority of the regulatory commissions of the states [over NSP's retail transactions]." Pet. App. 11a.

A. Petitioner

Petitioner Enron is one of North America's largest marketers of power, competing with traditional utilities such as respondent NSP. To transmit the power it sells, Enron depends on nondiscriminatory access to the transmission systems of others. Enron buys *firm* transmission

service on NSP's system in order to fulfill its obligations to deliver firm power to customers, sometimes in competition with NSP. Currently, Enron has under contract on NSP's transmission system a reservation of approximately 100 megawatts of firm transmission for next summer's peak demand period. This reservation is essential to Enron's ability to compete in marketing power in the vicinity of NSP's system. The question whether NSP may degrade the firm service that it has sold to Enron and other competitors is therefore crucially important to Enron; consequently, Enron intervened in this case in opposition to NSP's proposed change of tariff.

B. Statutory Background

The Federal Power Act (FPA), 16 U.S.C. §§ 792 *et seq.*, gives FERC jurisdiction over "the transmission of electric energy in interstate commerce" and "all facilities for such transmission." FPA § 201(b), 16 U.S.C. § 824(b). It also gives FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." *Id.* These are distinct grants of jurisdiction, and FERC's jurisdiction over interstate "transmission" is not limited by the words "at wholesale." *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (interpreting the parallel provisions of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*).[1]

Section 205 of the FPA, 16 U.S.C. § 824d, bars any public utility, "with respect to any transmission or sale subject to the jurisdiction of the Commission," from grant[ing] any undue preference or advantage to any

[1] All of the provisions of the FPA pertinent to this case are materially identical to parallel provisions of the NGA. This Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

person or subject[ing] any person to any undue prejudice or disadvantage" and requires each utility to file tariffs setting forth its "practices." Section 206(a), 16 U.S.C. § 824e(a), commands that if FERC determines that a practice is "unjust, unreasonable, unduly discriminatory or preferential," FERC must cure the discrimination and "determine the just and reasonable . . . practice . . . to be thereafter observed and in force, and shall fix the same by order." As the D.C. Circuit has noted with respect to parallel provisions of the NGA, "The Act fairly bristles with concern for undue discrimination." *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 998 (1987).

C. Regulatory Background

The FERC orders to NSP in this case are part of a more than twenty-year process by which Congress and FERC have helped introduce competition in the generation and sale of electric energy. Historically, electricity was provided by monopoly utilities that performed or contracted for all three key functions—generation, transmission, and delivery—and billed for electricity on a "bundled" basis. In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. §§ 2601 *et seq.*, which encouraged the creation of independent electric generating firms. *See* 16 U.S.C. §§ 2601, 2611. PURPA began a transformation of the industry: "In 1992, for the first time, generating capacity added by independent producers exceeded capacity added by utilities." *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-96 Reg. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036, at 31,643 (1996) [hereinafter Order No. 888], *clarified*, 76 F.E.R.C. ¶¶ 61,009, 61,347, *order on reh'g*, Order No. 888-A, III FERC Stats. & Regs. ¶ 31,048 (1997) [hereinafter Order

No. 888-A], *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *appeal pending sub nom. Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et al.* (D.C. Cir., argued Nov. 3, 1999) (quoting Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning Regulating the U.S. Electricity Industry*, 93 Colum. L. Rev. 1339, 1349 n.25 (1993)); Pet. App. 69a.

While electricity generation is now competitive, transmission facilities have generally continued to be owned and operated by the traditional utilities. Observing that there had been inadequate success in opening access to these facilities to new generating and marketing companies, Congress enacted the Energy Policy Act of 1992 (EPAct), 42 U.S.C. § 6807a, which gave FERC greater authority to order transmission-owning utilities to serve competing marketers of electricity. *See* Order No. 888 at 31,644-45; Pet. App. 72a-74a.

After an extensive rulemaking, FERC found in Order No. 888 that "transmission monopolists" have an inherent economic interest in "offer[ing] transmission [to competing sellers of electricity] on a basis that is inferior to that which they provide themselves." Pet. App. 126a. FERC explained that "by denying access or imposing discriminatory terms or conditions on transmission service [a transmission-owning utility] could foreclose other generators from competing." Pet. App. 70a (citation omitted). FERC also found that such monopolists were in fact discriminating; that such discrimination "will increase as competitive pressures continue to grow"; and that it was FERC's "duty to eradicate unduly discriminatory practices." Pet. App. 127a.

To eliminate this discrimination, FERC required utilities to offer "comparable" transmission to all users of the

interstate grid. It directed each transmission-owning utility to adopt a pro forma Open Access Transmission Tariff that would offer use of its transmission system to competing wholesale users on the same basis on which the utility itself uses the system to transmit power to its own customers. Pet. App. 94a-97a, 155a-156a. FERC determined that "[a]n essential element of non-discriminatory transmission access is the right of transmission customers to reserve and purchase transmission service that is of the same quality as that used by the transmission provider in serving its wholesale . . . and retail [customers]," Pet. App. 164a, and that this is particularly essential in the provision of the highest quality of service that utilities offer: firm transmission. *Id.* On the point of particular importance to this case, the OATT provides that any "curtailment" of "firm" transmission for other users must be proportional to curtailments of the utility's own uses in connection with its retail sales: "Curtailments will be made on a nondiscriminatory basis . . . ." Pet. App. 173a.

The concept of "firm" service is central to service comparability and FERC's effort to promote competition. Customers needing a continuous, reliable supply of power at times of peak demand pay a substantial reservation charge for this highest quality of transmission service. In Order No. 888, FERC insisted that only a single class of transmission service be sold as firm. Pet. App. 164a-166a. FERC did this because different power suppliers, competing to be attractive to customers, must be able to offer the same degree of assurance of continuous, reliable delivery of power. For example, were transmitting utilities, such as NSP, permitted to curtail transmission for competing suppliers of electricity before curtailing their own uses, they alone would be in a position to offer consumers reliable, continuous electricity. That would perpetuate the discrimination that Order No. 888 sought to remedy. And

competitors such as Enron, deprived of firm service comparable to that enjoyed by the utility, would be reluctant to invest in the facilities necessary to compete with the utility.

During the rulemaking process, several commenters took the position that transmission-owning utilities *should* be allowed to favor their "native load" retail customers by giving them a more favorable curtailment priority than other users of firm service. *See* Order No. 888 at 31,748; Pet. App. 166a-167a. FERC expressly rejected these arguments in its order on rehearing (Order No. 888-A), explaining that "sufficient [alternative] safeguards have been established to protect native load" retail customers. Pet. App. 271a. FERC explained that (1) "the transmission provider is responsible for planning and maintaining sufficient transmission capacity to safely and reliably serve its native load," *id.*, and (2) "the transmission provider [is permitted] to reserve . . . sufficient capacity to serve native load." *Id.* FERC thus allows a transmission owner to hold off the market and reserve for itself whatever firm capacity it expects to need to serve its own retail customers. But once the utility chooses to sell firm capacity to wholesale transmission users, the pro rata curtailment rule requires it to treat those other firm service users no less favorably than it treats itself. Pet. App. 271a-273a. To do otherwise would validate the discriminatory practice of offering competing users of the system firm service that is actually non-firm.

Petitions for review of numerous aspects of Order Nos. 888 and 888-A are pending in the D.C. Circuit. *Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et al.* (D.C. Cir., argued Nov. 3, 1999). Neither NSP nor any other party sought D.C. Circuit review of the pro rata curtailment issue raised by this case.

D. FERC Proceedings on the NSP Filings

Respondent NSP serves retail electric customers with a bundled package of generation, transmission, and delivery services, and sells unbundled firm transmission-only service to competing users of the system such as petitioner Enron. In 1996, in compliance with Order Nos. 888 and 888-A, respondent NSP filed its pro forma OATT. As required, the OATT provided that NSP "will curtail [transmission] service to Network Customers and Transmission Customers taking Firm Point-To-Point Transmission Service on a basis comparable to the curtailment of service to [NSP's] Native Load Customers." Pet. App. 314a-315a.

However, NSP later made various filings seeking to amend its OATT to replace the OATT curtailment scheme with other procedures. Pet. App. 319a-320a. FERC rejected these proposed procedures as insufficiently defined and not shown to be equivalent or superior to the OATT procedures. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,098 (April 30, 1998); Pet. App. 23a-24a. NSP next sought "clarification" from FERC that NSP could follow a curtailment plan that treated its own retail customers more favorably than other firm service customers. FERC denied NSP's "clarification," ruling that this scheme was not consistent with Order No. 888 or the OATT. 83 F.E.R.C. ¶ 61,338 (June 29, 1998); Pet. App. 40a.

Finally, NSP broadened its attack: It sought clarification, rehearing, and a stay on the ground that FERC did not have jurisdiction to regulate the curtailment of transmission service when that service is bundled together with a sale of power to NSP's own retail customers. FERC denied NSP's request, holding that in mandating pro rata curtailment it had "not regulate[d] bundled retail sales, but . . . [had] require[d] that wholesale transmission users

be treated comparably to the transmission provider's native load customers . . . ." 84 F.E.R.C. ¶ 61,128 (July 31, 1998); Pet. App. 43a.

E. The Decision Below

NSP petitioned the court of appeals for review of FERC's orders denying NSP's request to amend its OATT so as to allow it to favor its own native retail customers in any curtailment of firm service. FERC responded that the Eighth Circuit lacked jurisdiction to review its orders because NSP's petition amounted to a collateral attack on Order Nos. 888 and 888-A. The Eighth Circuit rejected this defense. Pet. App. 3a-4a.

On the merits, NSP argued that FERC does not have jurisdiction under the FPA to require pro rata curtailment of transmission among wholesale and retail customers because Congress reserved to the states the power to regulate retail sales. FERC explained that its orders did not prescribe curtailment rules for retail sales; rather, as to curtailments, those orders merely required that utilities concededly subject to FERC's jurisdiction not discriminate against third parties in favor of their own uses of transmission to make retail sales. Citing *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976), FERC noted that its undisputed jurisdiction over interstate transmission in connection with wholesales of power gives it authority to protect purchasers of firm transmission service for wholesale power against discrimination in favor of the transmitting company's own uses of its system. FERC also pointed out that its orders left NSP and other utilities fully able to provide for their own native retail customers by reserving and holding off the market sufficient firm capacity to do so.

FERC, however, shied away from the argument that most squarely validates its orders below, but this argu-

ment was made to the court by petitioner Enron and others. Citing *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), Enron argued that FERC has statutory jurisdiction to regulate the interstate transmission of electric power, including its curtailment, regardless of whether that power is sold downstream at wholesale or retail. FERC chose not to make this argument, despite its earlier conclusions in Order No. 888 that its FPA jurisdiction over interstate transmission does not depend on whether the electricity is sold downstream at wholesale or retail. Order No. 888 at 31,781.[2]

The Eighth Circuit rejected FERC's argument, ignored Enron's argument, and vacated and remanded the FERC orders denying NSP's amendments to its OATT. Without responding to FERC's explanation that retail customers are fully protected by NSP's freedom to withhold from the market as much transmission capacity as NSP believes necessary to serve its native retail customers, the court accepted NSP's argument that pro rata curtailment of firm transmission "will detrimentally affect native/retail customers." Pet. App. 6a. The court also held that FERC lacks jurisdiction because of the "indirect effect of Order No. 888" on nonjurisdictional sales to retail customers. Pet. App. 11a.

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[2] In Order No. 888, FERC determined that, although its jurisdiction over interstate transmission was unqualified, it nevertheless was "not necessary" for it to apply its nondiscrimination rules and the OATT directly to transmission of electricity for retail sales. Order No. 888 at 31,699-70, 31,781. On rehearing, in Order No. 888-A, FERC explained that its historical practice of not regulating transmission for bundled retail sales was "not the result of a legal requirement, [but rather] the practical result of the way electricity has historically been bought and sold." Order No. 888-A at 30,339. Elsewhere in Order No. 888-A, however, FERC stated (inconsistently) that it does not have FPA jurisdiction over transmission bundled with retail sales. Pet. App. 266a.

The court accepted NSP's argument that "to comply with FERC's interpretation of Order No. 888, as requiring comparable and equal service to point-to-point wholesale customers, along with its native/retail consumers, would violate state regulatory laws." Pet. App. 9a. Finding that "NSP . . . is placed between the proverbial rock and hard place, and will in effect be in violation of either a state tariff or Order No. 888," Pet. App. 10a, the court directed FERC on remand to amend its orders "so as to not encroach upon the authority of the regulatory commissions of the states." Pet. App. 11a. Petitions for rehearing by FERC, Enron, and others were denied. Pet. App. 281a-282a.

F. Proceedings on Remand

On remand, as instructed by the court of appeals, FERC issued an order allowing NSP to amend its OATT so as to differentiate between the firm service that NSP provides itself and an inferior "firm" service that it offers to others, including competitors such as Enron, attempting to address this differential with an unspecified difference in price. Pet. App. 44a-50a. FERC's court-mandated order on remand thus would permit NSP to adopt curtailment policies that discriminate in favor of NSP's own uses of its system to serve its own retail customers. Pet. App. 48a.

In response to FERC's order on remand, NSP filed a letter on November 19, 1999, seeking to withdraw its proposed OATT modification. Pet. App. 321a-325a. The withdrawal is effective December 6, 1999, unless an opposition is filed or FERC disapproves. *See* Withdrawal of Pleadings, 18 C.F.R. § 385.216 (1999). If and when it becomes effective, the withdrawal will erase the entire dispute and moot this case, leaving intact, however, the decision below seriously curtailing FERC's jurisdiction. In these circumstances it would be appropriate, and con-

sistent with this Court's practice, to vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case. *See United States v. Munsingwear*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case . . . which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (vacatur appropriate where the party seeking relief from the judgment below did not cause the mootness by its voluntary action).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision, holding that FERC lacks jurisdiction to protect interstate transmission of electric energy against undue discrimination in favor of the transmitting utility's own native retail customers, conflicts with decisions of this Court and the D.C. Circuit. The conflict is important: The electric industry is by many measures the largest industry in the United States and one of the most fundamental to the entire U.S. economy. If the Eighth Circuit's decision stands, no regulatory authority, federal or state, will have the power to bar significant discrimination in this vital industry by owners of interstate transmission facilities,[3] or to assure that suppliers of elec-

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[3] Neither NSP nor the Eighth Circuit questioned the fact that all transmission service at issue in this case is in interstate commerce. It has long been established that because of the way electricity flows, any transmission on a system interconnected with systems in other states is interstate transmission. *See FPC v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 208 (1964) (connection of California system with interstate grid).

tricity that are dependent on the transmission facilities of others will have a fair opportunity to compete.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS IN THREE IMPORTANT WAYS WITH DECISIONS OF THIS COURT AND THE D.C. CIRCUIT.

The Eighth Circuit ruled that FERC's orders, which it described as "requir[ing] NSP, a public utility, to curtail electrical transmission to wholesale (point-to-point) customers on a comparable basis with its native/retail consumers," Pet. App. 4a-5a, are invalid because they "fall[] outside of the FPA's specific grant of authority to FERC." Pet. App. 11a. This ruling conflicts with decisions of this Court and the D.C. Circuit in three ways. (A) The "FPA's specific grant of authority" gives FERC jurisdiction to regulate *all* interstate transmission of electricity, including the interstate transmission of electricity as part of a sale to retail customers; this Court and the D.C. Circuit have squarely upheld FERC's parallel jurisdiction under the equivalent provision of the Natural Gas Act (NGA). *See, e.g., Louisiana Power & Light Co., supra*; *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992). (B) FERC's undisputed jurisdiction over interstate transmission for wholesale sales gives FERC clear authority to protect such transmission against undue discrimination, and for that purpose FERC could take into account the terms of transmissions for retail sales, even if it does not have direct jurisdiction over the latter. *Conway Corp. v. FPC*, 510 F.2d 1264 (D.C. Cir. 1975), *aff'd*, 426 U.S. 271 (1976). (C) FERC's actions here did not in fact encroach upon state regulatory authority, but if there were a federal-state regulatory conflict here, it would be the state laws that must yield. *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988); *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986).

A. The Eighth Circuit's Decision Conflicts with the Decision of this Court in *Louisiana Power & Light Co.*, and the Decision of the D.C. Circuit in *Mississippi River Transmission Corp.*

In *Louisiana Power & Light* (*LP&L*), a case strikingly similar to this one, this Court ruled that FERC's jurisdiction to remedy undue discrimination extends to all interstate transportation of natural gas, whether for sale at wholesale or retail. That decision should have controlled this case.

In *LP&L*, at a time of natural gas shortage, FERC's predecessor, the Federal Power Commission (FPC), had required every interstate natural gas pipeline to file a tariff setting forth procedures for curtailing gas deliveries to (i) wholesalers buying gas for distribtuion to ultimate consumers and (ii) industrial direct sales customers purchasing nonjurisdictional gas at retail for their own use. This Court said that the case "pose[d] the question whether FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale." 406 U.S. at 631. The Court held that the FPC has jurisdiction over the interstate transportation of gas for both kinds of sales and therefore the power to impose curtailment procedures that affect both. Although the present case presents the identical issue under the FPA, the Eighth Circuit's only reference to *LP&L* was a mysterious "*cf.*" citation. Pet. App. 11a. But the decision in *LP&L* rested on two grounds that are both directly on point here.

First, this Court ruled that FPC's jurisdiction over interstate *transportation* of gas is distinct from its jurisdiction over *sales* of gas, and only the latter is limited to "sales for resale." The pertinent language of section 1(b) of the NGA, 15 U.S.C. § 717(b), is as follows:

> The provisions of this chapter shall apply to [1] the transportation of natural gas in interstate commerce,

> [and] to [2] the sale in interstate commerce of natural gas for resale . . . but shall not apply to any other transportation or sale of natural gas . . . .

The Court held that each of clauses [1] and [2] "is an independent grant of jurisdiction and, though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 637. The corresponding portion of section 201(b) of the FPA, 16 U.S.C. § 824(b), contains the same two clauses and is otherwise identical except that the FPA refers to "transmission of electric energy" rather than "transportation of natural gas"; refers to the "sale of electric energy at wholesale in interstate commerce" rather than to the "sale in interstate commerce of natural fas for resale"; and refers to "electric energy" rather than "natural gas." The decision in *LP&L* is thus equally applicable to the parallel clauses in the FPA.

Second, the *LP&L* Court explained that the policy of the NGA required the FPC to have plenary jurisdiction over interstate transportation. The NGA bars utilities from granting "any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage," 15 U.S.C. § 717c(b), and it commands the agency, on complaint or *sua sponte*, to eliminate any unduly discriminatory practice. 15 U.S.C. § 717d(a). The Court noted that if the FPC's jurisdiction over transportation were limited to transportation for wholesale sales, no agency (federal or state) could effectively prevent the discrimination at issue: "Comprehensive and equitable curtailment plans for gas transported in interstate commerce . . . are practically beyond the competence of state regulatory agencies . . . ." 406 U.S. at 641.

The FPA bars undue discrimination in identical language, *see* 16 U.S.C. § 824(b), and in almost identical

language commands FERC to eliminate discrimination. *See* 16 U.S.C. § 824e(a). Like *LP&L*, this case involves discrimination among transmission uses, some supporting sales subject to the FPA and others not. As in *LP&L*, no agency could effectively police such discrimination if FERC's jurisdiction over interstate transmission were confined to transmission for wholesale sales. FERC must have, as this Court declared in *LP&L*, "broad powers to devise effective means to meet these [antidiscrimination] responsibilities." 406 U.S. at 642.[4]

The D.C. Circuit, in a decision with which the present case also squarely conflicts, ruled that "FERC is not barred from regulating a pipeline's interstate *transportation* of natural gas merely because the *sale* of the gas being transported is [at retail and therefore] not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute." *Mississippi River Transmission Corp.*, 969 F.2d at 1217 (emphasis added). The court offered the following additional justification for the rule:

> As far as the statute is concerned, there would have been no doubt of FERC's [NGA] section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. To accept MRT's position would therefore be tantamount to conferring on private parties the power to decide whether FERC could set the rate for interstate transportation.

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[4] In *LP&L*, the Court explained:

> [W]hen we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation.

406 U.S. at 641 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961)).

In light of the principle of interchangeability between FPA and NGA precedents, *see supra* note 1, the Eighth Circuit's decision is in square conflict with *LP&L* and *Mississippi River Transmission Corp.*[5]

B. The Eighth Circuit's Decision also Conflicts with the Decisions of the D.C. Circuit and this Court in the *Conway Case*.

Starting with the erroneous premise that FERC lacks jurisdiction over interstate transmission of electricity for bundled retail sales, the Eighth Circuit concluded that FERC has no power to protect other interstate transmissions—over which FERC undisputedly does have jurisdiction—from undue discrimination by requiring pro rata curtailment. This conclusion does not follow from the premise and squarely conflicts with other decisions of this Court and the D.C. Circuit. Both Courts have held that the agency may, in regulating jurisdictional transactions, take action that affects other transactions over which the agency otherwise has no regulatory jurisdiction.

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[5] The Eighth Circuit's decision also conflicts with other decisions of this Court and other circuits upholding FERC's jurisdiction to regulate transportation of natural gas regardless of whether it is sold downstream at wholesale or retail. *See, e.g., Panhandle E. Pipe Line Co. v. Public Serv. Comm'n*, 332 U.S. 507, 523 (1947) (interruption of gas transportation is within FPC's jurisdiction, even though the gas is sold at retail to local users); *Fort Pierce Util. Auth. v. FPC*, 526 F.2d 993, 997 (5th Cir. 1976) ("[w]hile the Commission does not have the power to set rates for interstate gas which is not sold for resale, the Commission does have the power over allocations for such gas."); *see also Public Serv. Comm'n v. FERC*, 610 F.2d 439, 444 (6th Cir. 1979) (upholding FERC's jurisdiction to regulate transportation of gas from gathering line to local user); *Backus v. Panhandle E. Pipe Line Co.*, 558 F.2d 1373, 1375 (10th Cir. 1977) (holding that despite "fact that the gas which plaintiff receives comes from a gathering line and has not crossed a state line," the NGA gave FERC authority to regulate transportation of gas from gathering line to local user).

In *Conway Corp. v. FPC*, 510 F.2d 1264, 1271 (D.C. Cir. 1975), the question was "whether the FPC's authority, and responsibility, under §§ 205 and 206 [of the FPA], extend to claims of discrimination between rates for two classes of service, only one of which is subject to the jurisdiction of the Commission." At the time, the FPC's own position was that it did *not* have the authority, in regulating wholesale rates, to eliminate a discriminatory "squeeze" between those rates and retail rates subject only to state regulation. The D.C. Circuit disagreed:

> [A] common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination fall within the jurisdiction of the Commission. . . . The FPC's position would leave a regulatory gap—no institution would have authority to consider an undue preference between wholesale and retail rates, even where that preference was deliberately instituted for the purpose of clogging competition, and to reduce interstate wholesale rates.

510 F.2d at 1271-72. This Court affirmed, *FPC v. Conway Corp.*, 426 U.S. 271, 272 (1976): "[We hold that the FPC has] jurisdiction to consider the allegations of the company's wholesale customers that the proposed wholesale rates, which are within the Commission's jurisdiction, are discriminatory and noncompetitive when considered in relation to the company's retail rates, which are not within the jurisdiction of the Commission."

This case is indistinguishable from *Conway*, and the decision below is in flat conflict with that decision. Even if FERC otherwise had no jurisdiction to alter the terms on which NSP transmits power for sale to its own retail customers, FERC clearly has jurisdiction to require that transmission for sale to other firm transmission customers be treated no less favorably.

C. The Eighth Circuit's Decision Also Conflicts with *Mississippi Power and Light*, *Nantahala*, and the Supremacy Clause.

The Eighth Circuit's central justification for ruling that FERC lacks the power to require NSP to curtail firm transmission on a pro rata basis was that such a FERC requirement might make it impossible for NSP to serve its native retail load as required by state law. Here again, the Eighth Circuit's premise was wrong. There was no conflict between FERC's requirement and state law. Under Order Nos. 888 and 888-A, transmission providers like NSP are (i) responsible for planning and maintaining sufficient transmission capacity to serve their retail customers safely and reliably, and (ii) expressly permitted to withhold from the market sufficient transmission capacity to serve their retail customers before offering firm transmission service to third parties. Pet. App. 153a-154a, 271a. What FERC sought to bar NSP from doing was selling "firm" transmission service to third parties such as petitioner and then, in a constraint situation, treating that service as less firm than transmission for NSP's own uses.

Even if there were indeed a conflict between federal and state statutory requirements here, the federal requirement would of course prevail. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-211 (1824). NSP is a public utility operating interstate transmission facilities. If a federal requirement of nondiscrimination among users of those facilities meant that NSP could not serve retail customers exactly as one of the states in which it operates may require it to do, then the state requirement would have to yield. *See Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 509 (1989) (when it is impossible to comply with both federal and state law, state law

is preempted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (where a state regulation "stands as an obstacle to the accomplishment of the full purposes" and objectives of Congress, the state regulation is preempted).

In the rate-setting context, this Court has repeatedly held that federally established terms for wholesales of power must be taken as given—*i.e.*, treated as reasonable costs—in a state proceeding to establish a utility's retail rates. *See, e.g., Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986) (requirement that States respect FERC-filed wholesale terms is "a matter of enforcing the Supremacy Clause"). The same principle is equally applicable here: The federal requirement that transmission-owning utilities not discriminate in the operation of their interstate transmission facilities must be taken as given. If (contrary to the actual circumstances here) the effect of that requirement were to reduce a utility's ability to serve its own retail customers as directed by state law, the federal requirement would remain supreme. The Eighth Circuit's contrary decision that FERC's authority must be interpreted "so as to not encroach upon the authority of the regulatory commissions of the states" plainly conflicts with this principle.

II. THE EIGHTH CIRCUIT'S DECISION WOULD MAKE IT IMPOSSIBLE FOR FERC TO CARRY OUT ITS STATUTORY DUTIES TO REMEDY UNDUE DISCRIMINATION AND PROTECT THE SUPPLY OF ELECTRICITY; STATES CANNOT FILL THAT REGULATORY GAP.

The heart of the Eighth Circuit's decision is its determination that FERC lacks jurisdiction to impose a curtailment program that (the court believed) would have an

"indirect effect," Pet. App. 11a, on nonjurisdictional retail sales and would "encroach upon the authority of the regulatory commissions of the states." *Id.* The court's central premise—that at any intersection nonjurisdictional sales must remain unaffected and state regulatory authority must remain inviolate—would cripple FERC and create an unbridgeable regulatory gap.

The present case is a good example. Congress determined to encourage the creation of competing wholesale providers of electric power, and FERC determined that those firms must have nondiscriminatory access to the transmission grid, whose owners have an incentive to exclude competitors or give them inferior service. *See supra* pp. 5-8. FERC therefore ordered that NSP and other transmission-owning utilities may not, at a time of a system constraint requiring curtailment, favor transmission to their retail customers over other "firm" transmission customers. Such a rule is obviously essential: Without it, the transmission-owning utility will always be able to promise more reliable power delivery than its transmission-dependent competitor can offer. By holding that FERC lacks jurisdiction to impose such a rule, the Eighth Circuit has prevented FERC from eliminating this discrimination. That is a job no other governmental authority can do: No state commission has power to impose a nondiscrimination rule on interstate transmission of electricity that serves customers in several states. *Cf. LP&L*, 406 U.S. 621.

Curtailment, however, is by no means the only issue on which there is a threat of discrimination. Under Order Nos. 888 and 888-A, "comparability of access" also means that all transmission users must pay the facilities owner the same per-unit charge for the same quality of transmission service, *see* Pet. App. 222a-223a, and that they all should bear proportionate shares of the responsibility

for the "ancillary services" needed to maintain the stability and reliability of interconnected transmission services. Order No. 888 at 31,721. If FERC could not regulate these matters because they overlap with state-regulated sales to retail customers, the transmission-owning utility would be free either to deny service to third parties or charge more than the utility itself pays for comparable service. But under the Eighth Circuit decision, FERC would have no jurisdiction to require price equality, or proportionate sharing of costs of these transmissions, or nondiscrimination in most other aspects of interstate transmission service, because all of these requirements would affect the state-regulated terms and conditions of the utilities' retail tariffs.

The Eighth Circuit's decision would also interfere with FERC's efforts to insure reliable service. For example, in December 1998, FERC responded to serious threats to the operating integrity of the Eastern Interconnection (consisting of most of the electric systems east of the Rocky Mountains) by adopting modified Transmission Loading Relief (TLR) procedures to prevent transmission line overloads. *See North Am. Elec. Reliability Council*, 85 F.E.R.C. ¶ 61,353 (1998). The modified TLR procedures require a utility owning interstate transmission facilities to respond not only to constraints within its own system but to overload conditions anywhere in the Eastern Interconnection, and to do so without preferring transmission service to its own retail customers. *Id.* at 62,631. If the Eighth Circuit were right that FERC lacks jurisdiction to impose rules that may affect any transmission bundled with retail sales, FERC would be unable to protect the reliability of a regional grid from overloading caused by competing local preferences.

Virtually all of the terms and conditions for the transmission of electricity in interstate commerce potentially

"affect" the terms and conditions of the ultimate retail sale of that electricity. While the retail sale itself is subject only to state regulation, the Eighth Circuit's notion that upstream regulation by FERC cannot "encroach" upon downstream state requirements is clearly wrong. It is well established that otherwise valid FERC requirements are binding on state regulators. *See Nantahala*, 476 U.S. at 963-64, 66 (binding effect of FERC allocation of low-cost power). The same principle must be applicable to all of the aspects of interstate transmission that FERC alone can regulate: procedures for reserving and scheduling the use of transmission, transmission rates, curtailment priorities, rules for extending or terminating service, interconnection procedures, and many other transmission rules and practices addressed in FERC's Order Nos. 888 and 888-A. FERC regulation of all of these matters necessarily affects in some manner the downstream sales to retail customers that are regulated under state law. It is not an exaggeration to say that if the Eighth Circuit's "no encroachment on state regulation" principle were applied consistently, that application would wreak havoc upon interstate commerce in electricity.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted. If the case becomes moot through NSP's withdrawal of its filing, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot.

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